No. 5748

In the United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Defendant in Error

Names and Addresses of Attorneys of Record:

GEORGE NEUNER,
United States Attorney for the District of Oregon.

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Attorney for Plaintiff in Error.

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Attorney for Plaintiff in Error.

FACTS

In addition to the facts set forth in the brief of the plaintiff in error, we wish to call attention to other facts we deem important. Hereafter plaintiff in error will be referred to as the plaintiff and the defendant in error as the defendant.

The pleadings show that the insured, Charles E. Brandaw, was in the army but a short time from August 25, 1918, until October 21, 1918, and that his insurance was not in effect after November 30, 1918. The only issue tried was whether or not Brandaw became permanently and totally disabled while his policy was in effect, namely from August 28, 1918, until November 30, 1918.

The evidence was to the effect that at the time of plaintiff's enlistment, he was examined and apparently was in sound physical condition. That a few days after he was in the service he suffered a fit of epilepsy and was immediately given a thorough examination and a complete history taken relative to his disease. His trouble was diagnosed as congenital epilepsy and his history evidenced this condition for many years. Shortly after this examination he was discharged from service because of being physically unfit and he immediately let his insurance lapse. This evidence is borne out by defendants "Exhibit No. 2," the original of which is a part of the record on this appeal. This

exhibit was introduced without any objection on the part of the plaintiff. Hence there was evidence before the jury relative to Brandaw's condition prior to his enlistment.

Also during the trial of this action the plaintiff voluntarily introduced testimony relative to Brandaw's physical condition and his ability to work prior to his enlistment in the army. (Tr. 17.)

The plaintiff requested his instruction No. 7, which is found on page 19 of the transcript and the Court refused to give the same. After the Court had instructed the jury and the jury had retired for deliberation the plaintiff took exception to the refusal of the Court to give his requested instruction No. 7. The Court noted the exception after the jury had retired for deliberation. (Tr. 23 and 24.)

Plaintiff's sole contention on this appeal is that the Court erred in refusing to give his requested instruction No. 7, which he contends he was entitled to by virtue of Section 471 of Title 38, Page 219, U. S. C. A., the same being a section of the World War Veterans Act.

POINTS AND AUTHORITIES

I.

Section 471 of Title 38, Page 219, U. S. C. A., relates to compensation and not war risk insur-

ance and, therefore, this section does not entitle the insured in an action on a war risk insurance policy to an instruction, as requested by the plaintiff, that every enlisted man, or any other member employed in the active service under the War Department or Navy Department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders, and infirmities made of record in any manner by proper authorities of the United States at the time or prior to inception of active service.

Steve Oliver vs. United States—District of Arizona (Not Reported).

II.

An exception taken to the Court's refusal to give a requested instruction after the jury has retired will not be considered on appeal.

Brevard Tannin Co. v. J. F. Mosser Co., 288 Fed. 725;

New York Life Insurance Co. vs. Slocomb, 284 Fed. 810, 9th Ci

Joyce et al. vs. United States, 294 Fed. 665, 9th Cir.;

Fasulo vs. United States, 7 Fed. (2nd) 961, 9th Cir.;

Phelps vs. Mayer, 15 How. 161, 14 L. Ed. 643.

ARGUMENT

I.

It is the contention of the defendant that Section 471, supra, applies only to compensation and not to war risk insurance.

Section 471, after stating that compensation will be paid for death or disability suffered or contracted in the service, provides:

> "**For the purposes of this section** every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department, who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to

which any such defect, disorder, or infirmity was so made of record."

"For the purposes of this Section" relates to compensation.

This section provides that the enlisted man is conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service, and does not say he is conclusively held and taken to have been in sound condition when granted war risk insurance.

The World War Veterans Act is divided into several subdivisions. Part II thereof relates to Compensation and Treatment. Part III thereof relates to Insurance. Section 471 is under the head of Compensation. Compensation is a gratuitous benefit and Congress enacted laws to govern the director in the payment of claims for compensation. War Risk Insurance is a contractual relation and the contract is the only thing binding on the parties thereto. Congress has passed no laws regarding the payment of insurance, except to authorize the issuance of such insurance policies, whereby the Government in consideration for premiums paid, agrees to pay the insured a stipulated monthly sum in the event of his becoming totally and permanently disabled while the contract is in effect, or in case of the death of the insured, such payments to go to his beneficiary.

Section 471 is not written into the insurance contract nor is it made part of the contract by any law and examination of said section shows it to be inconsistent with the terms of the contract of War Risk Insurance.

This contract of insurance provides that before the insured is entitled to the benefits under the policy, he must become permanently and totally disabled, while his policy is in effect. There is no question that if the jury found that insured became totally and permanently disabled after his policy expired, he could not recover. Why is it not equally true that insured would not be entitled to recover if he was found to have been permanently and totally disabled prior to taking out his insurance? Insurance is an indemnity against a future loss and not against one which has already occurred.

Defendant admits that if insured was ill prior to taking out his insurance, but not permanently and totally disabled at that time, and later became totally and permanently disabled while his insurance was in effect even from the illness he suffered, the insured would be entitled to recover. Such is the holding in the cases of Jackson vs. United States, 24 Fed. (2nd) 981, and Jagodnigg vs. United States, 295 Fed. 915, cited by plaintiff, but these cases are not analogous to the case at bar.

We recognize the fact that any medical examination of Brandaw made prior to granting him the insurance, which indicated that insured was in a sound condition would be competent evidence, but not conclusive evidence, and not particularly so if later medical examinations showed a history of a long standing disability. Doctors and physicians are not infallible and mistakes are made.

This case is a good example. At the time Brandaw enlisted, he appeared to the army doctors as being in a sound condition. His epilepsy was not apparent as he suffered from no seizures during the examination. But within a few days after enlistment he had a fit of epilepsy and then a history of his case was taken and the evidence shows he was in the same physical condition for years prior to his enlistment as he was during the short period of two months he was in the service.

The Court's instructions were fair to the plaintiff. The Court states:

> "I think it is fair to assume in the absence of evidence to the contrary that he (Brandaw) was at the time (when he enlisted) in good substantial health, because otherwise he would not have been inducted into the army, because they were looking for able and healthy young men, and when he was inducted into the army

it is fair to assume that he was found to be in that condition."

The Court then goes on to instruct that:

"If it should appear and you should believe from the testimony that prior to his induction into the army and prior to the issuance of the policy, he was totally and permanently disabled so that he was not then able to continuously follow a gainful occupation, it would necessarily follow that his disability could not have occurred after the issuance of the policy and the Government would not be liable because the terms and the conditions of the policy had not been broken."

We contend that this instruction correctly states the law in construing a contract of War Risk Insurance. In the case of Steve Oliver vs. United States of America, recently tried by Judge F. C. Jacobs in the United States District Court for the District of Arizona, the Court in directing a verdict for defendant, stated:

THE COURT: Gentlemen, at the close of the evidence of the plaintiff yesterday evening, a motion was made by the defendant for an instructed verdict in favor of the defendant upon three different grounds and the court denied the motion. The third ground of the

motion was that the evidence failed to show that the plaintiff had suffered any loss since the issuance of this insurance policy and, upon reconsideration of that question, the court is satisfied that it was in error, judging the case from all the evidence that has been introduced by the plaintiff and the burden is always on the plaintiff to establish its case by a preponderance of the evidence and I am about to enter an order vacating the ruling on the motion for an instructed verdict. You may enter such an order, Mr. Clerk, and I find that it becomes my duty, under the law and the evidence of this case, to instruct this jury to return a verdict in favor of the defendant, for the reason that the evidence fails to disclose a loss suffered by this plaintiff subsequent to the issuance of the policy. The evidence, in my judgment, shows that the plaintiff is in the same condition today that he was at the time that the policy was issued. The evidence of Dr. Allen was very clear and distinct on that. The evidence of Dr. McNally is to the effect that light employment would probably cure this plaintiff of the ailment existing prior to and at the time of the issuance of this policy and this does not preclude the plaintiff from subsequently bringing an action on the policy,

if he suffers a total and permanent disability from any cause arising subsequent to the 1st of November, 1925. You may submit that verdict to one of the jury and one of you gentlemen may sign that and return it."

This case is not reported. Judge Jacobs took the same view as Judge Bean did in this case.

We are unable to find any Circuit Court of Appeals cases deciding the question whether or not Section 471 relates to insurance as well as compensation, but logical reasoning brings us to the conclusion that it does not. One case cited by plaintiff, namely: United States vs. Eliason, 20 Fed. (2nd) 821, does deal with another feature of Section 471, but that case does not say that the insured is entitled to the instruction as contended by plaintiff here. The facts in the Eliason case would warrant such an instruction as given by the trial court in that case, even in the absence of Section 471. The court decided that the instructions were not erroneous in view of the facts and did not decide that Section 471 entitled the insured to such instruction in all cases.

We submit that on the merits the instructions in the instant case were correct and that the Court's refusal to give the instruction No. 7, as requested, was not error.

II.

The plaintiff is not entitled to the exception taken to the refusal of the Court to give his requested instruction No. 7, because he did not take the exception before the jury retired for deliberation.

Page 23 of the Transcript shows what procedure was had relative to this exception. We contend, as indicated by the trial court, that this exception is not available. The Court stated:

> "I might say in reference to that exception —I don't know whether it is available because it was not taken until after the jury retired."

This Circuit has followed the rule as laid down in the case of Brevard Tannin Co. vs. J. F. Mosser Co., 288 Fed. 725, by Chief Justice Taft, wherein the Court stated:

> "It has further been held that an exception taken after the jury retired cannot be considered on a writ of error under the Federal practice, even if counsel are lulled into not taking exceptions while the jury is at the bar, either by stipulation, by the Court's granting permission to them to do so, or by an invariable practice in the trial court well known and acted upon by counsel."

In the case of Joyce et al. vs. United States, 294 Fed. 665, in this Circuit, this Court said:

> "The proper practice in federal courts is very simple and definitely established. From the time of the decision in Phelps vs. Mayer, 15 How 161, 14 L. Ed. 643, following the common law rule, it has been held that it must appear by the transcript that the party who complains of the refusal to instruct as requested, excepted to the refusal while the jury were at the bar."

See also New York Life Insurance Co. vs. Slocomb, 284 Fed. 810, and Fasulo vs. United States, 7 Fed. (2nd) 961, both being Ninth Circuit cases.

We submit that no error was committed by the trial court and that the exception was not well taken and, therefore, the judgment should be affirmed.

Respectfully,

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United States Attorney for the
District of Oregon;
FRANCIS E. MARSH,
Assistant United States Attorney,
Attorneys for Defendant.